CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 436

BROOKLYN AND QUEENS TRANSIT CORPORATION,
APPELLANT,

vs.

THE CITY OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 13, 1937.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 436

BROOKLYN AND QUEENS TRANSIT CORPORATION, APPELLANT,

vs.

THE CITY OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 6, 1937.

—2667

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BROOKLYN AND QUEENS TRANSIT CORPORATION, Plaintiff-Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant

STATEMENT UNDER RULE 234

This action was commenced by the service of the summons on defendant on or about September 23, 1936. On October 9, 1936, plaintiff served an amended complaint.

Defendant on October 29, 1936, served a notice of motion to dismiss the complaint and direct judgment for defendant for failure to state a cause of action. Defendant appeals from the order denying said motion.

Plaintiff appeared by George D. Yeomans and defendant appeared by Paul Windels, Corporation Counsel.

There has been no change of parties or of attorneys herein.

[fol. 2] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE APPELLATE DIVISION

SIRS:

Please take notice that the defendant hereby appeals to the Appellate Division of the Supreme Court, First Department, from the order entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant's motion to dismiss the complaint herein, and the defendant appeals from each and every part of said order as well as from the whole thereof.

Dated, February 11, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office and Post Office Address, Municipal Building, Borough of Manhattan, New York City.

[fol. 3] To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Extension, Borough of Brooklyn, New York City. Hon. Albert Marinelli, Clerk of New York County.

In Supreme Court of New York, County of New York, Special Term, Part III

Index Number 27746—Year 1936

Brooklyn & Queens Transit Corp.

against

The City of New York

Present: Hon. Aron Steuer, Justice

Order Appealed From

The following papers numbered 1 to 4 read on this motion, Argued—Dec. Res.—this 6th day of Jan., 1937. Motion Calendar No. 782.

	Papers Numbered
Notice of Motion and Annexed Complaint & Cont. #4	1-3

[fol. 4] Upon the foregoing papers this motion is disposed of similarly to the motion — New York Rapid Transit Corp. vs. The City of New York decided herewith.

Dated, January 14th, 1937.

Enter.

A. S., J. S. C.

Brief in Opposition—A.

In Supreme Court of New York, New York County

[Same title]

Notice of Motion to Dismiss Complaint

Please take notice that upon the summons and complaint herein, duly verified on the 9th day of October, 1936, and all the proceedings herein, a motion will be made at Special Term, Part III of this court, at the Court House thereof, Foley Square, Borough of Manhattan, City of New York,

on the 10th day of November, 1936, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the complaint herein and directing judgment for the defendant, on the grounds that the complaint does not set forth facts sufficient to state a cause of action and that the Court has no jurisdiction of [fol. 5] this action, and for such other and further relief as to this Court may seem just and proper.

Dated, New York, October 29, 1936.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Extension, Borough of Brooklyn, City of New York.

In Supreme Court of New York, New York County

[Same title]

Amended Complaint

The plaintiff, complaining of the defendant, by George D. Yeomans, its attorney, alleges, upon information and belief,

First. The plaintiff is a street railway corporation organized and existing under the laws of the State of New York [fol. 6] and having its principal office at No. 385 Flatbush Avenue Extension, Borough of Brooklyn, City and State of New York.

Second. Defendant is and at all times hereinafter mentioned was a Municipal Corporation organized and existing under the laws of the State of New York, being the only city in the State of New York having a population of a million inhabitants or more.

Third. Plaintiff is and at all times hereinafter mentioned was a common carrier lawfully engaged in the operation of a system of street surface railroads in the City of New York. By reason of the operation of said street railroads the plaintiff is and at all the times hereinafter mentioned was under the supervision of the Transit Commission which

is the Metropolitan Division of the Department of Public Service.

Fourth. In August, 1934, the Legislature of the State of New York passed a bill which, with the approval of the Governor, became a law on August 18, 1934, known as Chapter 873 of the Laws of 1934, and a copy thereof, marked Exhibit A, is hereto annexed and made a part hereof.

Fifth. In April, 1935, the Legislature of the State of New York passed a bill which, with the approval of the Governor, became a law on April 29, 1935, known as Chapter 601 of the Laws of 1935, and a copy thereof, marked Exhibit B, is hereto annexed and made a part hereof.

[fol. 7] Sixth. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, passed a bill which, with the approval of the Mayor, on or about December 5, 1934, became Local Law No. 21 of the City of New York for the year 1934.

Seventh. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, passed a bill which, with the approval of the Mayor, on or about February 27, 1935, became Local Law No. 2 of the City of New York for the year 1935, which said Local Law No. 2 of 1935 amended said Local Law No. 21 of 1934. Annexed hereto, marked Exhibit "C" and hereby made a part of this complaint is a copy of said Local Law No. 21 of 1934, as amended by said Local Law No. 2 of 1935, the words appearing in said copy in brackets being words originally contained in said Local Law No. 21 of 1934 which were stricken out by Local Law No. 2 of 1935, and the words in italics being new words added by said Local Law No. 2 of 1935 to the original language of said Local Law No. 21 of 1934.

Eighth. The Municipal Assembly of the City of New York, acting under the alleged authority of said Chapter 873 of the Laws of 1934, as amended by said Chapter 601 of the Laws of 1935, passed a bill which, with the approval of the Mayor, on or about December 4, 1935, became Local Law No. 30 of the City of New York for the year 1935, and a copy of said Local Law No. 30 of 1935, marked Exhibit D is hereto annexed and made a part hereof.

[fol. 8] Ninth. Said Local Law No. 21 for the year 1934, both in its original form and as amended by said Local Law

No. 2 for the year 1935, purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to the supervision of either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises or of holding property, or of doing business in the City of New York during the calendar year 1935, or any part thereof, equal to three per centum of its "Gross Income" for the calendar year 1935, and purports to impose an excise tax on every utility (as therein defined) doing business in the City of New York, but not subject to the supervision of either Division of the Department of Public Service, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, equal to three per centum of its "Gross Operating Income" for the calendar year 1935, each utility, as therein defined, being required by the terms of said Local Law to file with the Comptroller of the City of New York each month, commencing with the month of February, 1935, and ending with the month of January, 1936, a return showing its gross income, or gross operating income, as the case might be, for the preceding calendar month and to pay to the said Comptroller of the City of New York at the time of filing each return such portion of the tax purported to be imposed by said Local Law as should be equal to three per centum of its gross income, or gross operating income, as the case might be, for the period covered by such return.

[fol. 9] Tenth. Said Local Law No. 30 of the City of New York for the year 1935 purports to impose upon every utility (as therein defined) doing business in the City of New York and subject to either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York from January 1, 1936, to June 30, 1936, or any part of such period, equal to three per centum of its "Gross Income" for the said period, and purports to impose upon every utility (as therein defined) doing business in the City of New York, but not subject to the supervision of either Division of the Department of Public Service, an excise tax for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the City of New York, equal to three per centum of its "Gross Operating Income" for the said period

from January 1, 1936, to June 30, 1936, each utility being required, by the terms of said Local Law, to file with the Comptroller of the City of New York each month, commencing with the month of February, 1936, and ending with the month of July, 1936, a return showing its gross income, or gross operating income, as the case might be, for the preceding calendar month and to pay to the said Comptroller of the City of New York at the time of filing each return such portion of the tax purported to be imposed by said Local Law as should be equal to three per centum of its gross income, or gross operating income, as the case might be, for the period covered by such return.

Eleventh. Both said Local Law No. 21 of 1934, as amended, [fol. 10] and said Local Law No. 30 of 1935, contain provisions defining the word "Utility" as therein used as meaning "any person subject to the supervision of either Division of the Department of Public Service and every person, whether or not such person is subject to such supervision, who shall engage in the business of furnishing or selling to other persons gas, electricity, steam, water, refrigeration, telephony and/or telegraphy, or who shall engage in the business of furnishing or selling to other persons gas, electric, steam, water, refrigeration, telephone or telegraph service." Both of said laws define the word "person" to include corporations and define the words "Gross Income" as therein used as meaning and including "receipts received in or by reason of any sale made (except sale of real property) or service rendered in the City of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest, or discount paid, or any other expense whatsoever; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends and royalties, without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits [fol. 11] from any source whatsoever." Both of said laws

define the words "Gross Operating Income" to mean "receipts received in or by reason of any sale made or service rendered, of the property and services" specified in the definition of the word "utility" above referred to, "in the City of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services, or other costs, interest or discount paid, or any other expenses whatsoever."

Twelfth. The acts of the legislature of the State of New York known as Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, under the alleged authority of which the said Municipal Assembly of the City of New York adopted said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, purport to authorize any city of the State of New York having a population of one million inhabitants or more, acting through its local legislative body, to adopt and amend local laws imposing any tax or taxes which the state legislature has or would have power and authority to impose, to relieve the people of any such city from the hardships and suffering caused by unemployment, provided that any tax imposed thereunder shall have application only within the territorial limits of such city and shall be in addition to any and all other taxes.

Thirteenth. Said Chapter 873 of the Laws of 1934 and said Chapter 601 of the Laws of 1935 both provide in substance that revenues resulting from the imposition of taxes authorized by said Acts shall not be credited or deposited in [fol. 12] the general fund of the City, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which said Acts authorize the imposition of such taxes.

Fourteenth. Said Local Law No. 21 of 1934, as amended, and said Local Law No. 30 of 1935, each provides as follows:

"All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the City of New York and shall not be credited or deposited in the general fund of the City of New York but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the City of New

York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose."

Fifteenth. The said Local Law No. 21 of 1934, as amended by said Local Law No. 2 of 1935, and the said Local Law No. 30 of 1935, each provides for the enforcement and collection from utilities (as therein defined) of penalties for any failure to make a return or pay a tax under the provisions of and within the time required by said law, which penalties are fixed at 5% of the amount of the tax required to be paid by the terms of said law, plus 1 per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required by the law to be filed or the tax to be paid.

[fol. 13] Sixteenth. On the respective dates below specified the plaintiff, under protest and in order to avoid the threat of penalties, filed with the Comptroller of the City of New York return of its gross income for the respective months herein below specified:

Date of Filing Returns	Period Covered by Returns
February 28, 1935	Month of January, 1935.
March 25, 1935	" February, 1935.
April 25, 1935	" March, 1935.
May 25, 1935	" April, 1935.
June 25, 1935	" May, 1935.
July 25, 1935	" June, 1935.
August 24, 1935	" July, 1935.
September 25, 1935	" August, 1935.
October 25, 1935	" September, 1935.
November 25, 1935	" October, 1935.
December 24, 1935	" November, 1935.
January 25, 1936	" December, 1935.
February 25, 1936	" January, 1936.
March 25, 1936	" February, 1936.
April 25, 1936	" March, 1936.
May 25, 1936	" April, 1936.
June 25, 1936	" May, 1936.
July 25, 1936	" June, 1936.

Seventeenth. Each of said returns last above mentioned was filed involuntarily and under written protest and under duress and compulsion of and in order to avoid the penalties

purported to be provided for and which might be imposed under said Local Law No. 21 for the year 1934, as amended by said Local Law No. 2 for the year 1935 and under said Local Law No. 30 for the year 1935 in the event of plaintiff's failure to make and file each of such returns.

Eighteenth. On the respective dates below specified [fol. 14] plaintiff paid to defendant the respective sums below specified, being the respective amounts of alleged excise tax purported to be for the privilege of exercising its franchise or franchises or of holding property, or of doing business in the City of New York claimed by the Comptroller of defendant to be due from the plaintiff under said Local Law No. 21 for the year 1934, as amended by Local Law No. 2 for the year 1935, and under said Local Law No. 30 for the year 1935, the amount paid being three per centum of the gross income of plaintiff returned and reported as aforesaid for the respective months hereinafter specified, to wit:

Date of Payment	Amount of Payment	Month on the Gross Income for Which the Payment Was Based
February 28, 1935	$41,751.77	January, 1935
March 25, 1935	40,753.38	February, 1935
April 25, 1935	44,844.93	March, 1935
May 25, 1935	43,671.64	April, 1935
June 25, 1935	44,807.18	May, 1935
July 25, 1935	41,861.86	June, 1935
August 24, 1935	38,929.84	July, 1935
September 25, 1935	38,001.49	August, 1935
October 25, 1935	39,970.21	September, 1935
November 25, 1935	42,271.77	October, 1935
December 24, 1935	41,059.80	November, 1935
January 25, 1936	43,852.13	December, 1935
February 25, 1936	42,480.07	January, 1936
March 25, 1936	40,973.08	February, 1936
April 25, 1936	44,261.96	March, 1936
May 25, 1936	42,228.69	April, 1936
June 25, 1936	43,295.54	May, 1936
July 25, 1936	41,864.16	June, 1936
Total	$756,879.50	

[fol. 15] Nineteenth. Each of said payments last above mentioned was made involuntarily and under written pro-

test and under duress and compulsion of and in order to avoid the penalties purported to be provided for and which might be imposed for the failure to make such payment under said Local Law No. 21 for the year 1934, as amended by said Local Law No. 2 for the year 1935, or under said Local Law No. 30 for the year 1935.

Twentieth. The plaintiff is required to pay and has paid annually in advance to the State of New York under and pursuant to the provisions of Section 183 of the Tax Law of the State of New York a franchise tax "for the privilege of exercising its corporate franchise or of holding property in this State" (State of New York).

Twenty-first. Plaintiff is required to pay and has paid annually in advance to the State of New York under and pursuant to the provisions of Section 186 of the Tax Law of the State of New York an additional franchise tax "for the privilege of exercising its corporate franchise or exercising or its business in such corporate or organized capacity within this state" (State of New York), which said tax is equal to five-tenths of one per centum of its gross earnings from all sources within the State of New York.

Twenty-second. In addition to the franchise taxes mentioned in the two preceding paragraphs the plaintiff is required to pay annually a special franchise tax on the value of its property in and its special franchises to use the streets of the city in the maintenance and operation of its railroads.

[fol. 16] Twenty-third. Apart from the said taxes purported to be imposed by said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, the only taxes imposed or purported to be imposed by any laws adopted by the Municipal Assembly of the City of New York under and pursuant to the authority granted by Chapter 370 of the Laws of 1934 or Chapter 601 of the Laws of 1935, or for the purpose of supplying or being levied and collected during the period from January 1, 1935, to June 30, 1936, [illegible]

(a) a tax upon [illegible]

(b) a tax of [illegible]

extent as it affected and applied to other persons and corporations,

(3) a tax upon the transfer of estates of decedents, and

(4) a so-called excise tax for the privilege of carrying on or exercising for gain or profit within the City of New York any trade, business, profession, vocation or commercial activity, other than a financial business, equal to 1/10 of 1% upon the receipts in excess of $15,000 from such profession, vocation, trade, business or commercial activity exercised or carried on in the City of New York, and a so-called excise tax for the privilege of carrying on any financial business for gain or profit within the City of New York, equal to 1/5 of 1% upon the gross income in excess of $15,000 received from such financial business carried on [fol. 17] in the City of New York, these taxes being imposed on all individuals, copartnerships, societies, associations, joint stock companies, corporations and combinations of individuals exercising such privileges, excepting, however, utilities subject to tax under said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, they being exempted from the said tax of 1/10 of 1% in respect to their "gross income" or "gross operating income," as the case might be, upon which they were taxed at the rate of 3% under said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935.

No excise tax is or was during the period from January 1, 1933, to June 30, 1936, imposed by any law of the City of New York upon any person or corporation, other than a "utility," as defined in said Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, for the privilege of exercising franchises or of holding property or of doing business in the City of New York, other than the said excise tax equal to 1/10 of 1% upon the receipts in excess of $15,000 from any business carried on in the said City, excepting a financial business, and the said excise tax equal to 1/5 of 1% upon gross income in excess of $15,000 received from any financial business carried on in the City of New York.

A [illegible] tax upon corporations operating in the City of New York was imposed by the laws in the years 1933 to 1936 only based upon the privilege of exercising their respective corporate franchises and carrying

on their respective businesses in the State of New York, but also special franchise taxes on the values of their prop- [fol. 18] erties in and their franchises to use public streets and other places.

Twenty-fifth. The rate of fare which plaintiff is permitted to charge for transportation of passengers on the system of railroads operated by it in the City of New York is and at all the times herein mentioned was limited to five cents per passenger, except that in certain instances the plaintiff is permitted to make an additional charge for transfers from one railroad line of the system to another.

Twenty-sixth. The defendant has refused to permit the plaintiff, together with other street railroad corporations, to charge a fare of more than five cents per passenger exclusive of charges for transfers.

Twenty-seventh. Neither the Transit Commission nor any other Commission or body has the power or authority to increase the rate of fare for transportation of passengers on the system of railroads operated by the plaintiff in the City of New York beyond the sum of five cents per passenger exclusive of charges for transfers.

Twenty-eighth. By virtue of Local Law No. 16 of the City of New York for the year 1925, adopted September 17, 1925, the Charter of the City of New York was amended so as to provide that the Local Authority of the City of New York, to wit, the Board of Estimate and Apportionment, was forbidden to consider any resolution to increase the fare of five cents then and now provided by law or by contract or franchise, unless and until the proposal of the adoption [fol. 19] of any such resolution shall have been first submitted to the people of the City of New York upon a referendum and approved by a majority vote of the qualified voters of such city.

Twenty-ninth. There is no way without the consent of [illegible]

public any part of the so-called taxes collected from it by the defendant under the provisions of said local laws or any part of any other taxes which the plaintiff is required to pay, whereas other corporations which, under Local Law No. 17 of 1934 and Local Law No. 32 of 1935, were taxed at the rate of only one-tenth of one per centum on their gross receipts in excess of $15,000 from business conducted in the City of New York were and are in a position to pass on to the public such taxes as they were or may be required to pay, by increasing their prices for the goods sold or the services furnished by them.

Thirtieth. At the respective times of enactment of the said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, the defendant itself was operating, through its Board of Transportation, rapid transit railroads in the City of New York which, during the period from January 1, 1935, to June 30, 1936, competed and still do compete directly with the railroads operated by the plaintiff, [fol. 20] carrying passengers at a rate of five cents per passenger. Neither Division of the Department of Public Service has any supervision of or over the railroads thus operated by the Board of Transportation for the defendant, nor was the defendant, the City of New York, or its Board of Transportation, required to obtain from the Transit Commission or from either Division of the Department of Public Service a certificate of convenience and necessity for said railroads before constructing and operating the same. Some of said railroads constructed and operated by the defendant through its Board of Transportation run directly parallel to and on the same streets over and along which railroads are and for many years have been lawfully operated by the defendant, as, for instance, the new subway railroad in Jay, Smith and Ninth Streets, over and along which streets the plaintiff maintains and operates a street surface railroad known as the Smith Street Line, and [illegible] a substantial loss of income to the plaintiff and

the plaintiff has no protection whatever against such competition. Plaintiff's receipts from the operation of its said Smith Street Line dropped more than $12,000 per month after the commencement of operation of the said subway railroad of the defendant competing with said Smith Street Line.

[fol. 21] Thirty-first. At the time of the passage of said Local Law No. 21 of the City of New York for the year 1934, and at the time of the passage of said Local Law No. 2 of the City of New York for the year 1935, and also at the time of the passage of said Local Law No. 30 of the City of New York for the year 1935, upwards of ten thousand taxicabs were licensed and operated and still are licensed and operating in the City of New York for the transportation of persons for hire on, along and through the streets of the City of New York.

Thirty-second. Plaintiff is subjected to and has no protection against competition by taxicabs which are permitted by the defendant to operate and carry passengers for hire through the streets of the City of New York, including streets on which the railroads of the plaintiff are located. In many places in the City of New York taxicabs, both before and after the enactment of said local laws, have carried passengers long distances at a rate of fare of five cents per passenger over routes parallel to the routes of railroads owned and operated by the plaintiff and often along the same streets in which said railroads run, inducing persons who would otherwise have patronized the plaintiff's railroads to patronize the said taxicabs instead. The operation of the said taxicabs is not subject to supervision by the Transit Commission or either Division of the Department of Public Service.

Thirty-third. Neither said Local Law No. 21 of the City of New York for the year 1934, as amended by Local Law No. 2 of the City of New York for the year 1935, nor said Local Law No. 30 of the City of New York for the year 1935 purports to impose any tax on operators of [fol. 22] taxicabs for the privilege of doing business in the City of New York, and instead of being required to pay a tax of three per centum on their gross income under either of said local laws, they are required to pay a tax of only one-tenth of one per centum on their gross

income in excess of $15,000 for the privilege of conducting such business, they being subject to Local Law No. 17 of the City of New York for the year 1934, and Local Law No. 32 of the City of New York for the year 1935.

Thirty-fourth. The aforesaid taxes, both those purported to be imposed by Local Law No. 21 for the year 1934 and said Local Law, as amended, and those purported to be imposed by Local Law No. 30 for the year 1935, as well as those purported to be imposed by Local Law No. 17 for the year 1934, and Local Law No. 32 for the year 1935, are all emergency taxes imposed by the City of New York under authority of said Chapter 873 of the Laws of 1934, or said Chapter 601 of the Laws of 1934, and all of the said taxes are or were imposed for the purpose of defraying the expenses of unemployment and home relief in the City of New York, which, on information and belief, is not a local but a state purpose.

Thirty-fifth. Although the unemployment emergency in New York City is a matter of state concern for the relief of which the state legislature could have enacted laws imposing state wide taxation, the said legislature, by authorizing a city of over one million inhabitants (the only such city being the City of New York) to impose any taxes which the state legislature could have imposed but limit-
[fol. 23] ing the power so as to prevent such city from taxing any property located or any business conducted or transacted outside the City of New York, did, in effect, through the City of New York as its delegated agent, impose taxes for a state purpose on utilities doing business in one part of the state without imposing any taxes on utilities doing similar business in other parts of the state.

Thirty-sixth. The operating and maintenance expenses of railroad corporations (including the plaintiff) engaged in the operation of subway, elevated and/or street surface railroads in the City of New York are far higher in proportion to gross receipts than the operating and maintenance expenses of corporations engaged in other types of business but included within the same class purported to be taxed by the provisions of said local laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935. The ratio of net income to gross receipts is far higher in the case of corporations within the said class which are engaged in selling gas,

electricity, refrigeration, steam, water, telephone service and/or telegraph service than in the case of the plaintiff or any other railroad corporation which is included within the said class purported to be taxed by said local laws.

The net income for the calendar year 1935 of Brooklyn Edison Company, a corporation subject to the supervision of one of the divisions of the Department of Public Service and engaged in the business of selling electricity in the City of New York was, before deduction of taxes, approximately 42% of its gross receipts for the said calendar year.

The net income of the plaintiff for the calendar year 1935, before deduction of taxes, was approximately 14½% of its [fol. 24] gross receipts for the said calendar year.

Other street railroad corporations subject to the supervision of one of the divisions of the Department of Public Service and operating street railroads within the City of New York, while having substantial gross receipts from the conduct of their business during the year 1935, suffered a net loss for the said year and had no net income out of which to pay the said taxes purported to be imposed upon them by said Local Law No. 21 of 1934, as amended, so that the payment of said taxes under said local law simply added to their deficits.

Thirty-seventh. By reason of the facts stated in the preceding paragraph of this complaint, a tax of 3% of gross receipts imposed upon all corporations subject to the supervision of either division of the Department of Public Service is so far more burdensome upon some corporations within the taxed class than upon others as to make the distribution of the tax burden glaringly unequal within the class itself. The imposition of the tax is a plainly arbitrary method of collecting money for unemployment relief purposes in the easiest way without any thought of or attempt at equal distribution of the tax burden in proportion to benefits or to capacity to pay on the part of the respective persons and corporations taxed, or to the value of the privilege taxed.

Thirty-eighth. Each and all of said taxes purported to be imposed by said Local Law No. 21 for the year 1934, as amended, and by said Local Law No. 30 for the year [fol. 25] 1935, were illegally imposed, illegally collected and illegally received by the City of New York in that said Local

Law No. 21 for the year 1934 (both in its original form and as amended by Local Law No. 2 for the year 1935) and said Local Law No. 30 for the year 1935, and Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, under and pursuant to which said local laws, respectively, were purported to be enacted, are and each of them is illegal, unconstitutional, null and void, being in violation of Section 10 of Article I of the Constitution of the United States and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 6 of Article I of the Constitution of the State of New York, for the following reasons, among others:

1. They impair the obligations of franchise contracts made by the City of New York and/or the State of New York with the plaintiff or its predecessors in title, which contracts are now held by the plaintiff and under which it operates its said railroads.

2. They deprive the plaintiff and others of property without due process of law in that

(a) They make it impossible for the plaintiff to obtain a fair return on the value of its property devoted to public use in the operation of its railroads under said franchise contracts.

(b) Under the guise of purporting to impose taxes they provide for the exaction of money from a small group or class of persons and corporations for the benefit of another group or class of individuals, the exaction being neither [fol. 26] what can properly be called a tax nor a part of any plan or regulation in which both groups are interested. The exaction is not a tax because it is not an exaction for the support of the government and because it is specifically provided by the said laws that the moneys collected by means of the exaction shall not go into the general fund of the City or State of New York but shall be put into a special bank account or bank accounts and be used for no other purpose than the relief of those who suffer because of unemployment.

(c) The taxes purported to be imposed thereby are measured by a percentage of gross income without regard to the net income of or the ruinous effect upon the persons and corporations purported to be taxed.

(d) The persons and corporations purported to be taxed receive no benefits proportionate to the amounts of taxes they are required to pay under said local laws and are required by said local laws to pay the shares of others in the expense of a project which is of equal concern to all and which benefits the persons and corporations so taxed no more, in proportion to wealth, property or income, than any other person or corporation doing business in the City of New York.

3. They deny to the plaintiff and other corporations the equal protection of the law in that

[fol. 27] (a) Though being no part of any general or permanent plan of taxation, and though purporting to impose only emergency taxes for the purpose of unemployment relief, they arbitrarily single out one small group of persons and corporations and purport to tax them upon the privilege of holding property, doing business or exercising their franchises within the City of New York at a rate which is three thousand per cent higher than the rate of tax imposed for the same purpose upon other persons and corporations for the privilege of holding property, doing business or exercising their franchises within the City of New York, thereby arbitrarily and with hostile design placing a ruinous burden upon a special small group of persons and corporations in an attempt to make them pay far more than their fair share of the cost of the emergency relief, there being no sound or reasonable basis for the great discrimination against them.

(b) They purport to impose excise taxes on certain persons and corporations engaged in the transportation of passengers for hire within the City of New York without imposing similar taxes on other persons and corporations engaged in the transportation of passengers for hire and using the streets of the said City for the conduct of their business.

(c) Although the taxes purported to be imposed thereby are for a state purpose, they do not affect all persons and corporations in the same class throughout the state, but [fol. 28] affect only persons and corporations engaged in business or holding property within the City of New York without affecting persons and corporations engaged in the same character of business or holding the same kind of

property in any other part of the state outside the City of New York.

(d) The definition of the word "utility" contained in said local laws, which definition describes and determines the class of persons and corporations affected by the said laws, is such as to make the classification unreasonable and void, because, except as to the business of furnishing or selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service, the character of the business in which any person or corporation may be engaged is not made the test of whether or not such person or corporation is within the class taxable under said laws, but the sole test thereof is whether or not such person or corporation is subject to the supervision of either Division of the Department of Public Service regardless of the character of his or its business. This results in bringing within the class purported to be taxed under the said laws, many persons and corporations, including plaintiff, the taxing of whom at the same rate and on the same basis as the taxing of persons and corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service, and at a rate thirty times as high as the rate at which other persons and corporations [fol. 29] are taxed, is entirely unreasonable and unjustifiable.

(e) Even if it be reasonable to differentiate between utility corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service and/or telegraph service and corporations engaged in other lines of business, and to tax such utility corporations at a far higher rate than other corporations for the privilege of exercising their franchises, or of holding property or of doing business in the City of New York, there is no reasonable basis for so differentiating between the plaintiff and corporations which are not utilities, and it is wholly unreasonable to include the plaintiff in the same class, for the purpose of taxation, with utility corporations engaged in the business of selling gas, electricity, steam, water, refrigeration, telephone service or telegraph service because such utility corporations meet with little or no competition and at the same time can protect themselves from the ruination which might otherwise result from excessive taxation by obtaining higher

rates for the utility service furnished by them if, in view of the taxes they are required to pay, the present rates fixed by the Public Service Commission prove to be confiscatory, whereas the plaintiff meets with substantial competition in the operation of new underground railroads by the City of New York, the taxing agent, itself, and in the operation of taxicabs, and, being helpless to obtain any increase in the rate of fare which it may charge its pas- [fol. 30] sengers, has no way of defending itself against confiscation and ruination resulting from excessive taxation.

(f) The said local laws purport to impose a tax measured by a percentage of gross receipts upon a class defined in such a way as to include corporations the respective businesses of which and so essentially different in character that the ratio of net income to gross receipts in the case of one is radically less than in the case of another, the result of which is that said local laws produce glaring inequality in the distribution of the tax burden within the taxed class itself, arbitrarily discriminating in favor of some and against other members of the class, and taxing some far more heavily than others on the value of the privilege taxed.

Thirty-ninth. Defendant had no power or authority to enact the said Local Laws No. 21 of 1934, No. 2 of 1935 and No. 30 of 1935, and the same are null and void insofar as they purport to impose excise taxes upon the plaintiff in this action. Neither Chapter 873 of the Laws of 1934, nor Chapter 601 of the Laws of 1935, specifically empowers or shows any clear intent on the part of the State Legislature to empower any city to impose an excise tax, for the privilege of doing business, upon a street railroad corporation against which the City, the taxing agent, itself, directly competes by operating railroads of its own carrying passengers at a rate of fare of five cents per passenger, the income from which railroads is not sub- [fol. 31] jected to the same tax. It is so unfair, unreasonable and contrary to good public policy that a city should be allowed to impose an excise tax upon a street railroad corporation against which the City itself directly competes in the business of carrying passengers for hire, particularly where the income from the railroads operated by the City in competition with the railroads operated by the

said railroad corporation is not subject to the same tax as is the income from the latter, that no authority to impose such tax, whereby it may destroy or handicap its competitor without hurting its own business, can be deemed to have been granted to the City by the State Legislature under any general grant of powers of taxation and without language in an enabling act showing clear intent on the part of the State Legislature to grant such power.

Fortieth. By reason of all the foregoing, the exactions by the defendant from the plaintiff of the payments heretofore made under protest by the plaintiff as set forth in paragraph Eighteenth of this complaint were illegal, void and without authority.

Forty-first. All of the said moneys paid over by the plaintiff to the defendant as set forth in paragraph Eighteenth of this complaint amounting to a total of $756,879.50 are the property of and belong to the plaintiff and constitute moneys had and received by the defendant belonging to and for the benefit of the plaintiff.

Forty-second. The said sum of $756,879.50 paid by the plaintiff to the defendant as aforesaid was received by the [fol. 32] defendant, has been and still is retained by it and the defendant has refused and still refuses to repay the same or any part thereof to the plaintiff although the plaintiff has duly demanded such repayment.

Forty-third. On or about the 13th day of August, 1936, plaintiff duly presented its written demand and claim upon which this action is founded to the Comptroller of the City of New York for adjustment and more than thirty days have elapsed since said demand and claim upon which this action is founded were presented to said Comptroller for adjustment and he has neglected and refused to make adjustment or payment thereof for thirty days after such presentment.

Forty-fourth. There is now due and owing from the defendant to the plaintiff the sum of $756,879.50, with interest thereon from the respective dates on which the payments totalling said $756,879.50 were made, as set forth in paragraph Eighteenth of this complaint.

Wherefore, plaintiff demands judgment against the defendant for the sum of $756,879.50, with interest thereon as follows:

On $41,751.77 from February 28, 1935,
On $40,753.38 from March 25, 1935,
On $44,844.93 from April 25, 1935,
On $43,671.64 from May 25, 1935,
On $44,807.18 from June 25, 1935,
On $41,861.86 from July 25, 1935,
On $38,929.84 from August 24, 1935,
On $38,001.49 from September 25, 1935,
On $39,970.21 from October 25, 1935,
[fol. 33] On $42,271.77 from November 25, 1935,
On $41,059.80 from December 24, 1935,
On $43,852.13 from January 25, 1936,
On $42,480.07 from February 25, 1936,
On $40,973.08 from March 25, 1936,
On $44,261.96 from April 25, 1936,
On $42,228.69 from May 25, 1936,
On $43,295.54 from June 25, 1936,
On $41,864.16 from July 25, 1936.

together with the costs and disbursements of this action.

George D. Yeomans, Attorney for Plaintiff, Office and P. O. Address, 385 Flatbush Avenue Extension, Brooklyn, New York.

(Verified by W. S. Menden, President of the Brooklyn and Queens Transit Corporation, on October 9, 1936.)

[fol. 34] EXHIBIT "A" ANNEXED TO AMENDED COMPLAINT
(CHAPTER 873 OF THE LAWS OF 1934)

AN ACT to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws.

Became a law August 18, 1934, with the approval of the Governor. Passed, on emergency message, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until December thirty-first, nineteen hundred thirty-five to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make provision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending December thirty-first, nineteen hundred thirty-five, or any portion of such period. A tax imposed hereunder shall have application only within the territorial [fol. 35] limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed

without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross income or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any [fol. 36] such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

[fol. 37] EXHIBIT "B" ANNEXED TO AMENDED COMPLAINT
(CHAPTER 601 OF THE LAWS OF 1935)

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, entitled "An Act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and to limit the application of such local laws," in relation to extending until July first, nineteen hundred thirty-six the time within which the power conferred by such act may be exercised and excepting from such power the right to impose taxes on incomes or upon the transfers of estates of deceased persons

Became a law April 29, 1935, with the approval of the Governor. Passed, by a two-thirds vote, on emergency message and message of necessity.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, entitled "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by un-[fol. 38] employment and to limit the application of such local laws" are hereby amended to read as follows:

§ 1. Notwithstanding any other provision of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred thirty-six to adopt and amend local laws imposing in any such city any tax and/or taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment and make pro-

vision for the collection thereof by the chief fiscal officer of any such city. The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen hundred thirty-six, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons.

This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed [fol. 39] without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Provided, however, that nothing herein contained shall limit or prevent the imposition of a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such city. No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts under the provisions of this act.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and

used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred [fol. 40] thirty-three, and for the relief purposes for which the said taxes have been imposed under the provisions of this act.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes, imposed under this act, and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its local emergency work bureau or by its public welfare or other department under the supervision and control of its local emergency work bureau. These provisions shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 3. This act shall take effect immediately.

[fol. 41] EXHIBIT "C" ANNEXED TO AMENDED COMPLAINT (LOCAL LAW No. 21 OF 1934 AS AMENDED BY LOCAL LAW No. 2 OF 1935)

A Local Law to relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment, work and home relief.

Be it enacted by the Municipal Assembly of the City of New York as follows:

§ 1

Definitions.—When used in this local law:

(a) The word "person" or the plural thereof, includes and shall be deemed to refer to and mean corporations, com-

panies, associations, joint stock associations, copartnerships, *estates, assignees of rents, any person acting in a fiduciary capacity* and/or persons, their *assignees*, lessees, trustees or receivers appointed by any court whatsoever, or *by any other means.*

(b) The word "comptroller" shall be deemed to refer to and mean the comptroller of the city of New York.

(c) The words "gross income" shall be deemed to refer to and include receipts received in or by reason of any sale made (except the sale of real property) or service rendered [fol. 42] in the city of New York, including cash, credits and property of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profit from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends, [rents] and royalties without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever.

(d) *The words "gross operating income" shall be deemed to refer to and include receipts received in or by reason of any sale made or service rendered, of the property and services specified in subdivision (c) of this section, in the City of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of the materials used, labor or services or other costs, interest or discount paid, or any other expenses whatsoever.*

[d] (e) The word "utility" shall be deemed to refer to and mean any person subject to the supervision of *either division* of the department of public service and every person *whether or not such person is subject to such* supervision who shall engage in the business of furnishing or

[fol. 43] selling to *other persons,* gas, [electric], *electricity,* steam, water, *refrigeration, telephony, and/or telegraphy, or who shall engage in the business of furnishing or selling to other persons, gas, electric, steam, water, refrigeration,* telephone or telegraph service [whether or not such person is subject to supervision by the department of public service.]

(f) The word "return" includes any amended return filed or required to be filed as herein provided.

§ 2

Imposition of Excise Tax.—Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, during the calendar year nineteen hundred thirty-five or any part thereof, every utility doing business in the city of New York *and subject to the supervision of either division of the department of public service,* shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross income for the calendar year nineteen hundred and thirty-five *and every other utility doing business in the city of New York shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross operating income for the calendar year nineteen hundred thirty-five.* Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law and shall be paid at the time and in the manner hereinafter provided, but any utility subject to tax hereunder shall not be liable to any tax under Local Law No. 17 of *the* [fol. 44] *local laws of the city of New York for the year 1934* [.] *with respect to its gross income or gross operating income as the case may be.*

For the purpose of proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross revenues *or income* of any such utility are derived from business conducted wholly within the territorial limits of the city of New York until the contrary is established, and the burden of proving that any part of its gross revenues *or income* is not so derived shall be upon such utility.

§ 3

Records to Be Kept.—Every utility subject to tax hereunder shall keep such records of its business and in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 4

Returns: Requirements as to.—On or before the twenty-fifth day of February, nineteen hundred and thirty-five, and on or before the twenty-fifth day of every month thereafter until the twenty-fifth day of January, nineteen hundred and thirty-six, every utility subject to tax hereunder shall file a return with the comptroller on a form to be furnished by the comptroller. Such return shall state the gross income or *gross operating income as the case may be* [fol. 45] for the preceding calendar month and shall contain any other data, information or matter which the comptroller may require to be included therein. The comptroller may require at any further time a supplemental return hereunder, which shall contain any data upon such matters as the comptroller may specify.

Every return required hereunder shall have annexed thereto an affidavit of the head of every such business making the same, or of the owner or of a copartner thereof, or of the principal officer of the corporation if such business be conducted by a corporation, to the effect that the statements contained therein are true.

The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 5

Payment of Tax.—At the time of filing a return, as provided under section four hereof, each utility shall pay to the comptroller such portion of the tax imposed by this local law as is equal to three per centum of its gross income *or gross operating income as the case may be* for the period

covered by such return. Such portion of the tax shall be due and payable on the last day on which the return for such period is required to be filed, regardless of whether a return is filed or whether the return which is filed correctly indicates the amount of tax due.

§ 6

Determination of Tax by Comptroller.—In case the return required by section four hereof shall be insufficient or [fol. 46] unsatisfactory to the comptroller, or if such return is not made as required, and if the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the comptroller, the comptroller shall determine the amount of tax due from such information as he is able to obtain, and if necessary, may estimate the tax on the basis of external indices. The comptroller shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax unless the person against whom it is assessed shall within thirty days after the giving of notice of such determination apply to the comptroller for a hearing or unless the comptroller of his own motion shall reduce the same. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller may be reviewed by certiorari if application therefor is made within thirty days after the giving of notice of such determination.

An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed, with penalties thereon, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§ 7

Proceedings to Recover Tax.—Whenever any person shall fail to pay any tax or part thereof or penalty im- [fol. 47] posed by this local law as in this local law provided, the corporation counsel of the city of New York shall,

upon the request of the comptroller, bring an action in the name of the city of New York to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant, directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the person from whom the tax is due, which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner, and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for his services in executing the warrant he shall be entitled to the same fees, which he may collect in the same manner.

[fol. 48] In the discretion of the comptroller, a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance of the city of New York and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 8

Notices and Limitation of Time.—Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a post-paid envelope addressed to such person at the address given in any return filed by him pursuant to the provisions of this local law or if no return has been filed then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

[fol. 49] § 9

Penalties.—Any person failing to file a return or corrected return, or to pay any tax or any portion thereof within the time required by this local law shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the comptroller and disposed of in the same manner as other receipts under this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or copartner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is willfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

[fol. 50] § 10

Refunds.—If within one year from the payment of any tax or penalty the payer thereof shall make application for a refund thereof and the comptroller or the court shall determine that such tax or penalty, or any portion thereof was erroneously or illegally collected, the comptroller shall refund the amount so determined. For like cause and within the same period a refund may be so made on the initiative of the comptroller. Whenever a refund is made the comptroller shall state his reasons therefor in writing. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the comptroller as provided in section six of this local law unless the comptroller after a hearing as in said section provided or of his own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal, in which event a refund shall be made as above provided upon the determination of such proceeding.

An application for a refund made as herein provided shall be deemed an application for a revision of any tax or penalty complained of and the comptroller may receive additional evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested and he shall be entitled to a certiorari order to review such determination, subject to the provision of section six in respect thereto.

[fol. 51] § 11

General Powers of Comptroller.—In the administration of this local law the comptroller shall:

First. Make such reasonable rules and regulations, not inconsistent with law, as may be necessary for the exercise of his powers and the performance of his duties under this local law, and prescribe the form of blanks, reports and other records relating to the administration and enforcement of this local law.

Second. Assess, determine, revise, readjust and impose the taxes authorized to be imposed under this local law.

Third. Take testimony and proofs, under oath, with reference to any matter within the line of his official duty under this local law or he may designate and duly authorize an employee to act in his place for that purpose.

Fourth. To request information from the tax commission of the State of New York or the United States collector of internal revenue relative to any person, and to afford information to such tax commission or such collector of internal revenue relative to any person, any other provision in this local law to the contrary notwithstanding.

§ 12

Administration of Oaths and Compelling Testimony.—The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comp- [fol. 52] troller under this local law. The comptroller shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct under this local law, and to examine them in relation to any matter which he has power to investigate hereunder and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto

shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record.

§ 13

Returns to be secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any [fol. 53] manner, the receipts or any other information relating to the business of a taxpayer contained in any return required under this local law.

The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the city of New York or of the comptroller, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or fact shown thereby are directly involved in such action or proceeding, in either of which events, the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more.

Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof or the inspection by the corporation counsel of the city of New York or other legal representatives of such city of the return of any taxpayer who shall bring action or proceeding to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted or is contemplated for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

[fol. 54] § 14

Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this local law shall be paid into the treasury of the city of New York and shall not be credited or deposited in the general fund of the city of New York but shall be deposited in a

separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

§ 15

Application: Construction.—If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances, shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred and seventy-three, laws of one thousand nine hundred and thirty-four, pursuant to which it is enacted.

§ 16

Effective Date.—This local law shall take effect immediately.

[fol. 55] EXHIBIT "D" ANNEXED TO AMENDED COMPLAINT.
(LOCAL LAW No. 30 OF 1935)

A Local Law

To relieve the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by imposing an excise tax on the gross income of every person doing business within such city and subject to supervision of either division of the department of public service, and of any and all other utilities doing business within such city to enable such city to defray the cost of granting unemployment work and home relief.

Be it enacted by the Municipal Assembly of The City of New York as follows:

§1

Definitions.—When used in this local law:

(a) The word "Person," or the plural thereof, includes and shall be deemed to refer to and mean corporations, companies, associations, joint stock associations, co-part-

nerships, estates, assignees or rents, any person acting in fiduciary capacity and/or persons, their assignees, lessees, trustees or receivers appointed by any court whatsoever, or by any other means.

(b) The word "comptroller" shall be deemed to refer to and mean the comptroller of the city of New York.

(c) The words "gross income" shall be deemed to refer to and include receipts received in or by reason of any sale made (except sale of real property) or service rendered in the city of New York, including cash, credits and property [fol. 56] of any kind or nature (whether or not such sale is made or such service is rendered for profit) without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interest or discount paid, or any other expense whatsoever; also profits from the sale of securities; also profits from the sale of real property growing out of the ownership or use of or interest in such property; also profits from the sale of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the period for which a return is made); also receipts from interest, dividends and royalties without any deductions therefrom for any expenses whatsoever incurred in connection with the receipt thereof, and also gains or profits from any source whatsoever.

(d) The words "gross operating income" shall be deemed to refer to and include receipts received in or by reason of any sale made or service rendered, of the property and services specified in subdivision (e) of this section, in the city of New York, including cash, credits and property of any kind or nature, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or services or other costs, interests or discount paid, or any other expenses whatsoever.

(e) The word "utility" shall be deemed to refer to and mean any person subject to the supervision of either division of the department of public service, and every person whether or not such person is subject to such supervision [fol. 57] who shall engage in the business of furnishing or selling to other persons gas, electricity, steam, water,

refrigeration, telephony and/or telegraphy or who shall engage in the business of furnishing or selling to other persons gas, electric, steam, water refrigeration, telephone or telegraph service.

(f) The word "return" includes any amended return filed or required to be filed as herein provided.

§ 2

Imposition of Excise Tax.—Notwithstanding any other provision of law to the contrary, for the privilege of exercising its franchise or franchises, or of holding property, or of doing business in the city of New York, from January first, nineteen hundred and thirty-six, to June thirtieth, nineteen hundred and thirty-six, or any part of such period, every utility doing business in the city of New York and subject to the supervision of either division of the department of public service, shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross income for the period from January first, nineteen hundred and thirty-six to June thirtieth, nineteen hundred and thirty-six, and every other utility doing business in the city of New York shall pay to the comptroller of the city of New York an excise tax which shall be equal to three per centum of its gross operating income for the period from January first, nineteen hundred and thirty-six, to June thirtieth, nineteen hundred and thirty-six. Such tax shall be in addition to any and all other taxes and fees imposed by any other provision of law and shall be paid at the time and in the manner here-[fol. 58] inafter provided, but any utility subject to tax hereunder shall not be liable to any tax under local law of the local laws of the city of New York of the year nineteen hundred and thirty-five, board of estimate and apportionment introductory number ninety-five of the year nineteen hundred and thirty-five, with respect to its gross income or gross operating income as the case may be.

For the purpose of proper administration of this local law and to prevent evasion of the tax hereby imposed, it shall be presumed that the gross revenues or income of any such utility are derived from business conducted wholly within the territorial limits of the city of New York until the contrary is established, and the burden of proving that

any part of its gross revenues or income is not so derived shall be upon such utility.

§ 3

Records to be Kept.—Every utility subject to tax hereunder shall keep such records of its business and in such form as the comptroller may by regulation require. Such records shall be offered for inspection and examination at any time upon demand by the comptroller or his duly authorized agent or employee and shall be preserved for a period of three years, except that the comptroller may consent to their destruction within that period or may require that they be kept longer.

§ 4

Returns; Requirements as to.—On or before the twenty-fifth day of February, nineteen hundred thirty-six, and on or before the twenty-fifth day of every month thereafter until the twenty-fifth day of July, nineteen hundred thirty-[fol. 59] six, every utility subject to tax hereunder shall file a return with the comptroller on a form to be furnished by the comptroller. Such return shall state the gross income or gross operating income as the case may be for the preceding calendar month, and shall contain any other data, information or matter which the comptroller may require to be included therein. The comptroller may require at any further time a supplemental return hereunder, which shall contain any data upon such matters as the comptroller may specify.

Every return required hereunder shall have annexed thereto an affidavit of the head of every such business making the same, or of the owner or of a co-partner thereof, or of the principal officer of the corporation if such business be conducted by a corporation, to the effect that the statements contained therein are true.

The comptroller may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

§ 5

Payment of Tax.—At the time of filing of return, as provided under section four hereof, each utility shall pay to the comptroller such portion of the tax imposed by this

local law as is equal to three per centum of its gross income or gross operating income as the case may be for the period covered by such return. Such portion of the tax shall be due and payable on the last day on which the return for such period is required to be filed, regardless of whether a return is filed or whether the return which is filed correctly indicates the amount of tax due.

[fol. 60] § 6

Determination of Tax by Comptroller.—In case the return required by section four hereof shall be insufficient or unsatisfactory to the comptroller, or if such return is not made as required, and if the maker fails to file a corrected or sufficient return within twenty days after the same is required by notice from the comptroller, the comptroller shall determine the amount of tax due from such information as he is able to obtain, and if necssary, may estimate the tax on the basis of external indices. The comptroller shall give notice of such determination to the person liable for such tax. Such determination shall finally and irrevocably fix such tax unless the person against whom it is assessed shall within thirty days after the giving of notice of such determination apply to the comptroller for a hearing or unless the comptroller of his own motion shall reduce the same. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller may be reviewed by certiorari if application therefor is made within thirty days after the giving of notice of such determination.

An order of certiorari shall not be granted unless the amount of any tax sought to be reviewed with penalties thereof, if any, shall be first deposited with the comptroller and an undertaking filed with the comptroller, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such order be dismissed or the tax confirmed the applicant for the writ will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

[fol. 61] § 7

Proceedings to Recover Tax. Whenever any person shall fail to pay any tax or part thereof or penalty imposed by

this local law, as in this local law provided, the corporation counsel of the city of New York shall, upon the request of the comptroller, bring an action in the name of the city of New York to enforce payment of the same.

As an additional or alternate remedy, the comptroller may issue a warrant directed to the sheriff of any county within the city of New York, commanding him to levy upon and sell the real and personal property of the person from whom the tax is due, which may be found within his county, for the payment of the amount thereof, with any penalties, and the cost of executing the warrant, and to return such warrant to the comptroller and to pay to him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant file with the clerk of his county a copy thereof, and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the tax and penalties for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property and chattels real of the person against whom the warrant is issued in the same manner as a judgment duly docketed in the office of such clerk. The sheriff shall then proceed upon the warrant in the same manner and with like effect, as that provided by law in respect to executions issued against property upon judgments of a court of record, and for his services in executing the war- [fol. 62] rant he shall be entitled to the same fees, which he may collect in the same manner.

In the discretion of the comptroller a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance of the city of New York and in the execution thereof such officer or employee shall have all the powers conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the comptroller may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city of New York had recovered judgment therefor and execution thereon had been returned unsatisfied.

§ 8

Notices and Limitation of Time.—Any notice authorized or required under the provisions of this local law may be given by mailing the same to the person for whom it is intended in a post-paid envelope addressed to such person at the address given in any return filed by him pursuant to the provisions of this local law or if no return has been filed then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this local law by the giving of notice shall commence to run from the date of mailing of such notice.

The provisions of the civil practice act relative to the limitation of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken to levy, [fol. 63] appraise, assess, determine or enforce the collection of any tax or penalty provided by this local law.

§ 9

Penalties.—Any person failing to file a return or corrected return or to pay any tax or any portion thereof within the time required by this local law, shall be subject to a penalty of five per centum of the amount of tax due, plus one per centum of such tax for each month of delay or fraction thereof excepting the first month after such return was required to be filed or such tax became due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty. Such penalty shall be paid to the comptroller and disposed of in the same manner as other receipts under this local law. Unpaid penalties may be enforced in the same manner as the tax imposed by this local law.

Any person and any officer of a corporation or co-partner filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this local law which is willfully false and any person who shall fail to file a return as required under this local law, and the officers of any corporation which shall so fail, shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The certificate of the comptroller to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this local law shall be prima facie evidence thereof.

[fol. 64] § 10

Refunds.—If within one year from the payment of any tax or penalty the payer thereof shall make application for a refund thereof and the comptroller or the court shall determine that such tax or penalty, or any portion thereof, was erroneously or illegally collected, the comptroller shall refund the amount so determined. For like cause and within the same period a refund may be so made on the initiative of the comptroller. Whenever a refund is made the comptroller shall state his reasons therefor in writing. However, no refund shall be made of a tax or penalty paid pursuant to a determination of the comptroller as provided in section six of this local law unless the comptroller after a hearing as in said section provided or of his own motion, shall have reduced the tax or penalty or it shall have been established in a certiorari proceeding that such determination was erroneous or illegal, in which event a refund shall be made as above provided upon the termination of such proceeding.

An application for a refund made as herein provided shall be deemed an application for a revision of any tax or penalty complained of and the comptroller may receive additional evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested and he shall be entitled to a certiorari order to review such determination, subject to the provisions of section six in respect thereto.

[fol. 65] § 11

General Powers of Comptroller.—In the administration of this local law the comptroller shall:

First. Make such reasonable rules and regulations, not inconsistent with law as may be necessary for the exercise of his powers and the performance of his duties under this local law, and prescribe the form of blanks, reports and other records relating to the administration and enforcement of this local law.

Second. Assess, determine, revise, readjust and impose the taxes authorized to be imposed under this local law.

Third. Take testimony and proofs, under oath, with reference to any matter within the line of his official duty under this local law or he may designate any duly authorize an employee to act in his place for that purpose.

Fourth. To request information from the tax commission of the state of New York or the United States collector of internal revenue relative to any person; and to afford information to such tax commission, or such collector of internal revenue relative to any person, any other provision in this local law to the contrary notwithstanding.

§ 12

Administration of Oaths and Compelling Testimony.—The comptroller or his employee duly designated and authorized by the comptroller shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of the powers and duties of the comptroller under this local law. The comptroller shall [fol. 66] have power to subpoena and require the attendance of witnesses and the production of books, papers and documents pertinent to the investigations and inquiries which he is authorized to conduct under this local law, and to examine them in relation to any matter which he has power to investigate hereunder and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

A justice of the supreme court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller hereunder.

Any person who shall testify falsely in any material matter pending before the comptroller hereunder shall be guilty of a misdemeanor and punishment for which shall be a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

The officers who serve the comptroller's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record.

§ 13

Returns to be Secret.—Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or any officer or employee of the department of finance to divulge or make known in any manner, the receipts or any other information relating to the business of a taxpayer contained in any return [fol. 67] required under this local law.

The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the city of New York or of the comptroller, or on behalf of any party to any action or proceeding under the provisions of this local law when the returns or fact shown thereby are directly involved in such action or proceeding, in either of which events, the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more.

Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax, nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof or the inspection by the corporation counsel of the city of New York or other legal representatives of such city of the return of any taxpayer who shall bring action or proceeding to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted or is contemplated for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

§ 14

Disposition of Revenues.—All revenues and moneys resulting from the imposition of the taxes imposed by this

local law shall be paid into the treasury of the city of [fol. 68] New York and shall not be credited or deposited in the general fund of the city of New York, but shall be deposited in a separate bank account or accounts, and shall be available and used solely and exclusively for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment, including the repayment of moneys borrowed for such purpose.

§ 15

Application: Construction.—If any provision of this local law, or the application thereof to any person or circumstances, is held invalid, the remainder of this local law, and the application of such provisions to other persons or circumstances, shall not be affected thereby. This local law shall be construed in conformity with chapter eight hundred seventy-three, laws of nineteen hundred and thirty-four as amended by chapter six hundred one of the laws of nineteen hundred and thirty-five, pursuant to which it is enacted.

§ 16

This Local Law Shall Not be Deemed to Repeal or in any way affect local law number twenty-one for nineteen hundred and thirty-four, as amended by local law number two for nineteen hundred and thirty-five, but the aforesaid local laws shall remain in full force and effect.

§ 17

Effective Date.—This local law shall take effect immediately.

[fol. 69] In Supreme Court of New York, Appellate Division, First Department

[Same title]

Stipulation as to Exhibits Not Printed

It is hereby stipulated and agreed by and between the attorneys for the respective parties to this appeal, subject to the approval of the Court, that Contract No. 4 between the City of New York and the New York Municipal

Railway Corporation, dated March 19, 1913, cited in the short-form order of Steuer, J., dated January 14, 1937, be omitted from this printed record on appeal, without prejudice to the rights of either party on this or any appeal to refer to said contract in briefs and upon argument, or to submit the original to the Appellate Court or Courts with the same force and effect as if printed herein, the reason assigned being that said exhibit is voluminous and would tend to clutter up the record.

Dated March 3, 1937.

Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant. George D. Yeomans, Attorney for Plaintiff-Respondent.

So Ordered: F. M.

[fol. 70] IN SUPREME COURT OF NEW YORK

OPINION OF STEUER, J.

(Reported in 97 New York Law Journal 241 on January 15, 1937.)

N. Y. R. T. Corp'n v. City of N. Y.—This motion seeks dismissal of the complaint for failure to state a cause of action. The complaint seeks the recovery of moneys paid under protest, pursuant to Local Laws No. 21 of 1934, and Nos. 2 and 30 of 1935, upon the ground that these statutes are unconstitutional. The first objection to the pleading is to the form of the action. This is at law for money had and received, ordinarily the accepted form for the relief desired (Ætna Ins. Co. v. The Mayor, 153 N. Y., 331). The objection is based on section 10 of the act which is headed "Refunds," and provides for application to the comptroller where a tax has been "erroneously or illegally collected" and for certiorari to review his decision. While in a sense the claim here is that the collection was illegal it is not such a claim as is contemplated by the section, and it is not that which would or could be entertained by the comptroller. Consequently the statutory provision lacks application here (Buder v. First Nat. Bank in St. Louis, 16 F., 2d, 990).

The plaintiff is a transportation corporation operating a railroad under contract with the defendant which con-

tract is known as Contract No. 4. Plaintiff is subject to the supervision of the Metropolitan Division of the Department of Public Service. By the local laws above enumerated the defendant city, pursuant to the authority vested in it by chapter 815, Laws 1933, and similar acts annually thereafter, imposed a tax of 3 per cent. upon the gross income of persons or corporations subject to the supervision of the said department. The purpose of [fol. 71] the tax was provision for relief for the unemployed and the moneys so collected are provided to be held apart from other city funds.

The complaint seeks the recovery back of the moneys paid on several grounds. The first is that the local laws are unconstitutional in that they impair the obligations of Contract No. 4. The facts alleged to show the impairment are that the contract antedates the local laws. It provides that the revenues derived from the operation of the road be devoted to several purposes in order. Of these the second is taxes and assessments, which is followed by operating expenses, maintenance and depreciation. Then comes several sums payable to plaintiff representing a sum equal to what it was earning on its roads prior to entering into the contract, interest on its contribution to the cost of the road, and other interest payable to it. The claim is that by the imposition of this tax plaintiff's opportunity to receive from the income of the road the sums collectible by it are reduced as the payment of taxes comes ahead of these sums. The contract contains no agreement that taxes in addition to those current at the time of its execution will not be levied. In fact the contrary is expressly indicated. The claim is, therefore, that there is an implied condition that the city will do nothing which may tend to reduce the amount collectible by plaintiff under its contract. A contract with a governing power contains no such implied condition where the act complained of is the legitimate exercise of a governmental function. Assuming the act to be of such a character the city may operate a competing business and it may tax its contractee's business and exempt its own from taxation (Puget Sound Co. v. Seattle, 291 U. S., 619). It is further pleaded in this connection that the Enabling [fol. 72] Acts (chap. 815, Laws of 1933 et seq.) give no authority to defendant to tax this plaintiff. The inspira-

tion for this claim rests on nothing in the Enabling Act but on the fact that Contract No. 4 was executed in accordance with the Rapid Transit Act (chap. 4, Laws 1891 as amended), and that pursuant to the direction of that act the revenues receivable by the city are to be used for a purpose specified alike in the act and the contract. It is claimed that the local laws will deprive the city of revenues from the contract because of the sums collected as taxes, and these sums will not be employed in the manner designated in the Rapid Transit Act. It is concluded that the local laws are for that reason in derogation of the Rapid Transit Act, and while it is conceded that the State Legislature might have given the local legislature authority to enact such legislation it is not to be presumed that it did so without an express grant to that effect. The conclusion reached would be sound were it based on a sound hypothesis (Socony-Vacuum Oil Co., Inc., v. City of New York, 247 App. Div., 163, holding that the Enabling Act gives no authority to impose a tax repugnant to the established policy of the state). As a matter of theory the local law does not prevent the coming into existence of a balance payable to the defendant city for the purposes of the Rapid Transit Act, and as a matter of fact there is no allegation in the complaint that the effect of the local law has been to prevent such a balance. Furthermore, while this particular tax was not in contemplation when the Rapid Transit Act became law, nothing in that act is in conflict with the conception of there being taxes imposed which would, of necessity, reduce the payments provided to be made to the defendant.

[fol. 73] The tax is next alleged to be unconstitutional on the ground that it takes from the receipts of the plaintiff such a sum that the remainder does not equal a fair return on its investment. This contention was practically abandoned on the argument, and rightfully so, for, "even if the tax should destroy a business it would not be made invalid or require compensation on that ground alone" (Alaska Fish Co. v. Smith, 255 U. S., 44, 48).

The next contention is founded on these two facts: The tax is a tax on utilities and the proceeds are segregated and devoted to the relief of unemployed persons. From these facts it is argued that this measure is not a tax but an exaction from one group for the benefit of the other and,

not being regulatory, is without authority. A tax upon utilities as a group is a valid classification (New York Steam Corp'n v. City of New York, 268 N. Y., 137). It is true that in the absence of some connection between the group taxed and the beneficiaries thereof, if such beneficiaries there be, renders an impost not a tax but an illegal exaction (United States v. Butler, 297 U. S., 1). Here there is no group or class that are the beneficiaries. The unemployed are not connected by ties of origin, location or occupation. They are no more a class than are the aged, the insane or the sick. Their relief has been held beyond dispute to be a duty of the state. "If the moral and physical fibre of its manhood and its womanhood is not a state concern, the question is, what is?" (Adler v. Deegan, 251 N. Y., 467, 484). The argument that this is an exaction for the benefit of a class is untenable.

Additional facts are alleged from which conclusions are drawn as to the validity of the local laws. Certain of [fol. 74] these claims are set forth in various forms, but analysis reduces them to the following: The tax being on gross income is improper because it is ruinous and because it creates inequality; the tax places a greater burden on one group of taxpayers, the utilities, than on others; the tax is improper in that it is imposed upon some engaged in transportation and not others; that the method of defining utilities in the local law is unfair thereby making an improper classification; and, particularizing, the plaintiff differs from the other utilities in that it is prevented by contract from increasing its rates and cannot pass the effect of the tax on to its consumers.

Investigating these in order it will be seen from the foregoing that the weight of the burden of the tax does not affect its validity. The point of inequality is factually supported. Plaintiff does business on a shorter margin of profit than many of the other persons subject to the tax. The consequent result is that the percentage of plaintiff's profit taken by the tax exceeds that taken from the others in the same group. It is shown that this difference amounts in at least one instance to 300 per cent. It is further alleged that this discrepancy comes about not through different methods of management or the like, but because of the essential differences in the nature of the business conducted by the two utilities. Exact equality is not required of a

tax (Clark v. Titusville, 184 U. S., 329). Nor is there anything inherently improper in a tax on gross receipts (Metropolis Theatre Co. v. Chicago, 228 U. S., 61). Where, however, gross inequalities result from that method of taxation, and where this inequality is effectuated by the definition of the class to be taxed, the tax must fail (Stewart Dry Goods Co. v. Lewis, 294 U. S., 550). On this point [fol. 75] the allegations of the complaint are sufficient. It may be noted that this question was not raised in the previous cases where the validity of the local laws was under inquiry.

The claim of unconstitutionality because of the unusual burden placed by the tax on utilities has been disposed unfavorably to the plaintiff's position (N. Y. Steam Corp'n v. City, supra), as has the contention that others engaged in similar businesses are not taxed (So. Blvd. RR. v. City of N. Y., C. C. A., 2nd Circuit, 1936, not yet officially reported). To the last contention, which refers to plaintiff's inability to pass the tax on to its customers, in which its position differs from the other utilities, it is a sufficient answer that this is an accident of trade whose consequence must be accepted as inherent in our form of government (see Fox v. Standard Oil Co. of N. Y., 294 U. S., 87, 102).

The motion is denied without prejudice to a motion by defendant to strike out such portions of the complaint as are irrelevant to the one issue which is valid. Order signed.

[fol. 76] IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Appellate Division, the order appealed from, the opinion of Steuer, J., and all the papers on which said order and opinion are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, March 11th, 1937.

Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant. George D. Yeomans, Attorney for Plaintiff-Respondent.

[fol. 77] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please take notice that the defendant pursuant to leave granted by an order of the Appellate Division of the Supreme Court, First Department, dated the first day of June, 1937, hereby appeals to the Court of Appeals from the order of the said Appellate Division of the Supreme Court, First Department, dated the 21st day of May, 1937, and entered in the office of the Clerk of said Appellate Division on or about the same day which order affirmed the order entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant's motion to dismiss the complaint herein and defendant appeals from each and every part of said [fol. 78] Appellate Division order as well as from the whole thereof.

Dated, June 1, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Defendant, Office and P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Avenue Ext., Borough of Brooklyn, New York City.

To Hon. Albert Marinelli, Clerk of New York County.

[fol. 79] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

ORDER GRANTING LEAVE TO APPEAL TO THE COURT OF APPEALS—June 1, 1937

The above named defendant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 21st day of May, 1937,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Paxton Blair in support of said motion, and after hearing Mr. Paul Windels for the motion, and the respondent appearing but not opposing,

[fol. 80] It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, as follows:

Does the complaint herein state facts sufficient to constitute a cause of action?

In Supreme Court of New York, Appellate Division

3977

Brooklyn and Queens Transit Corporation, Respt.,

vs.

The City of New York, Applt.

Order of Affirmance—May 21, 1937

An appeal having been taken to this Court by the defend-
[fol. 81] ant from an order of the Supreme Court, New York County, entered on or about the 15th day of January, 1937, denying defendant's motion for judgment dismissing the complaint, and said appeal having been argued by Mr. Sol Charles Levine of counsel for the appellant, and by Mr. Harold L. Warner of counsel for the respondent; and due deliberation having been had thereon,

It is hereby ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondent, with leave to the defendant to answer within twenty days after service of a copy of this order with notice of entry thereof upon payment of said costs. Two of the Justices dissenting and voting to reverse and grant the motion.

IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

John A. Leddy, being duly sworn, says that he is Acting Chief Clerk in the office of the Corporation Counsel of The City of New York; that no written opinion or memorandum was handed down by the Appellate Division in deciding this appeal.

John A. Leddy.

Sworn to before me this 3rd day of June, 1937. Hugh H. Senior, Notary Public, Bronx County, Certificate filed in New York County.

[fol. 82] IN SUPREME COURT OF NEW YORK

WAIVER OF CERTIFICATION

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order granting leave to appeal to the Court of Appeals, the order of affirmance and all the papers upon which said order of affirmance is founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 and Section 616 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, June 3rd, 1937.

George D. Yeomans, Attorney for Plaintiff-Respondent. Paul Windels, Corporation Counsel, Attorney for Defendant-Appellant.

[fol. 83] IN COURT OF APPEALS OF NEW YORK

REMITTITUR—July 13, 1937

[fol. 84] BROOKLYN AND QUEENS TRANSIT CORPORATION, Respondent,

ag'st

THE CITY OF NEW YORK, Appellant.

Be It Remembered, That on the 4th day of June, in the year of our Lord one thousand nine hundred and

thirty-seven, The City of New York, the appellant in this cause, came here unto the Court of Appeals, by Paul Windels, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Brooklyn and Queens Transit Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by George D. Yeomans, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Paxton Blair, of counsel for the appellant, and by Mr. Harold L. Warner, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the orders herein be and the same hereby are reversed and complaint dismissed, with costs in all courts and question certified answered in the negative, on authority of New York Rapid Transit Corporation vs. The City of New York, decided herewith.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, there to be proceeded upon according to law.

[fol. 85] Therefore, it is considered that the said orders be reversed and complaint dismissed, with costs in all courts and question certified answered in the negative &c., &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office

Albany, July 13, 1937.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 86] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

BROOKLYN AND QUEENS TRANSIT CORPORATION,
Plaintiff-Respondent,

against

THE CITY OF NEW YORK, Defendant-Appellant.

ORDER ON REMITTITUR—August 6, 1937

The defendant-appellant, pursuant to leave granted by an order of this Court dated the 1st day of June, 1937, having appealed to the Court of Appeals from the order of this Court dated the 21st day of May, 1937 and entered in the office of the Clerk of this Court on or about the same day, which order affirmed with $20. costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937 denying defendant-appellant's motion for judgment dismissing the complaint herein, and this Court having certified to the said Court of Appeals the following question, to wit:

"Does the complaint herein state facts sufficient to constitute a cause of action?"

And the said appeal having been duly argued at the Court of Appeals, and that Court, in an order dated the [fol. 87] 13th day of July, 1937 having ordered and adjudged that the order of this Court so appealed from and the order of the Special Term aforesaid be reversed and the complaint dismissed with costs in all courts and the

question certified answered in the negative, and having further ordered that the record and proceedings in said Court of Appeals be remitted to this Court, there to be proceeded upon according to law,

Now, upon reading and filing the remittitur from the said Court of Appeals and on motion on Paul Windels, Corporation Counsel, attorney for defendant-appellant, it is

Ordered that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

[fol. 87½] Please take notice, that an Order, of which the within is a copy, was this day duly entered in the office of the Clerk of the Appellate Division of the Supreme Court in and for the First Judicial Department on the 6th day of August 1937 and a certified copy of said order was duly filed in the office of the Clerk of the County of New York on the 9th day of August, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for Deft.-Applnt., Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for pl., 385 Flatbush Ave. Ext., Bklyn., N. Y.

Copy received Aug. 11, 1937. George D. Yeomans, Attorney for —.

[fol. 87a] In Supreme Court of New York, New York County

Brooklyn and Queens Transit Corporation, Plaintiff-Respondent,

against

The City of New York, Defendant-Appellant

Judgment on Remittitur

The defendant-appellant having appealed to the Court of Appeals from the order of the Appellate Division, First Department, dated the 21st day of May, 1937, and entered

in the office of the Clerk of said Appellate Division, on or about the same day, which order affirmed with $20.00 costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defendant-appellant's motion for judgment dismissing the complaint herein, and the said appeal having been duly argued at the Court of Appeals and that Court in an order dated the 13th day of July, 1937, having ordered and adjudged that the order of the Appellate Division, First Department so appealed from be reversed and the complaint dismissed with costs in all Courts, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having remitted the record and proceedings in said Court of Appeals to the Appellate Division, First Department, there to be proceeded upon according to law, and an order having been duly filed and entered in the office of the Clerk of the said Appellate Division on or about the 6th day of August, 1937, making the order and judgment [fol. 87b] of the Court of Appeals the order and judgment of the Appellate Division, First Department, and a certified copy of said order having been duly filed and entered in the office of the Clerk of the County of New York on the 9th day of August, 1937, and the costs of the defendant-appellant having been duly taxed at the sum of $289.03

Now, on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant it is

Adjudged that the complaint be and the same hereby is dismissed upon the ground that the complaint does not state facts sufficient to constitute a cause of action; and it is further

Adjudged that the defendant-appellant, The City of New York (Municipal Building, New York City), recover of the plaintiff-respondent, Brooklyn and Queens Transit Corporation (385 Flatbush Avenue Extension, Borough of Brooklyn, New York City) the sum of $289.03 costs as taxed, and that said defendant-appellant have execution therefor.

Dated, August 9, 1937.

Albert Marinelli, Clerk.

[fol. 87c] Please take notice that a Judgment of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, August 9, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Ave. Ext., Bklyn., N. Y.

Copy received Aug. 11, 1937. George D. Yeomans, Attorney for —.

[fol. 88] In Supreme Court of New York, New York County

[Title omitted]

Order Resetting Judgment—August 11, 1937

Upon the annexed approval as to form and waiver of notice of settlement and on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant, it is

Ordered that the judgment entered herein in the office of the Clerk of the County of New York on the 9th day of August, 1937, be and the same hereby is resettled so as to read as follows:

"Supreme Court, New York County

Brooklyn and Queens Transit Corporation,
Plaintiff-Respondent,

against

The City of New York, Defendant-Appellant

The defendant-appellant having appealed to the Court of Appeals from the order of the Appellate Division, First Department, dated the 21st day of May, 1937, and entered in the office of the Clerk of said Appellate Division, on or about the same day, which order affirmed with $20.00 costs and disbursements the order of the Special Term entered herein in the office of the Clerk of the County of New York on or about the 15th day of January, 1937, denying defend-

[fol. 89] ant-appellant's motion for judgment dismissing

the complaint, and the said appeal having been duly argued at the Court of Appeals and that Court in an order dated the 13th day of July, 1937, having ordered and adjudged that the said order of the Appellate Division, First Department, and the said order of the Special Term be reversed and the complaint dismissed with costs in all Courts, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and having remitted the record and proceedings in said Court of Appeals to the Appellate Division, First Department, there to be proceeded upon according to law, and an order having been duly filed and entered in the office of the Clerk of the said Appellate Division on or about the 6th day of August, 1937, making the order and judgment of the Court of Appeals the order and judgment of the Appellate Division, First Department, and a certified copy of said order having been duly filed and entered in the office of the Clerk of the County of New York on the 9th day of August, 1937, and the costs of the defendant-appellant having been duly taxed at the sum of $289.03,

Now, on motion of Paul Windels, Corporation Counsel, attorney for defendant-appellant it is

Adjudged that the said order of the Appellate Division, First Department, and the said order of the Special Term be and the same hereby are reversed; and it is further

Adjudged that the complaint be and the same hereby is dismissed upon the ground that the complaint does not state facts sufficient to constitute a cause of action; and it is further

Adjudged that the defendant-appellant, The City of New York (Municipal Building, New York City), recover of the plaintiff-respondent, Brooklyn and Queens Transit Corporation (385 Flatbush Avenue Extension, Borough of Brooklyn, New York City) the sum of $289.03 costs as taxed, and that said defendant-appellant have execution therefor.

Dated, August 9th, 1937.

Albert Marinelli, Clerk."

Enter.

C. P., J. S. C.

[fol. 90] The foregoing order is hereby approved as to form and notice of settlement thereof waived.

Dated, August 11, 1937.

George D. Yeomans, Attorney for Plaintiff-Respondent.

[fol. 90½] Please take notice that an Order, of which the within is a copy, was this day duly entered and filed in the office of the Clerk of the County of New York.

New York, Aug. 12, 1937.

Yours, etc., Paul Windels, Corporation Counsel, Attorney for the Defendant, Municipal Building, Borough of Manhattan, New York City.

To George D. Yeomans, Esq., Attorney for Plaintiff, 385 Flatbush Ave., Ext., Bklyn.

Copy received Aug. 16, 1937. George D. Yeomans, Attorney for —.

[fol. 91] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal

The petition of Brooklyn and Queens Transit Corporation, the appellant in the above entitled cause, for an appeal in the above entitled cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignments of error, and statement of jurisdiction under Rule 12 of the Rules of the United States Supreme Court, all as provided by Rule 46 of said Rules, together with a prayer for reversal, and the record in this cause having been considered, and it appearing from said petition and the record in the above entitled cause that there was drawn in question the validity of Local Law No. 21 of 1934, as amended, and Local Law No. 30 of 1935, of the City of New York on the ground that said Local Laws deny to the appellant the equal protection of the law and deprive the appellant of its property without due process of law, in violation of [fol. 92] the Fourteenth Amendment to the Constitution of the United States, and that the decree of the Court was in favor of the validity of said Local Laws, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New York, dated the 9th day of August, 1937, as resettled by order of said

Supreme Court of the State of New York, dated August 11, 1937, as prayed in said petition, and that the Clerk of the Supreme Court of the State of New York, to which court the record herein has been remitted, shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of said Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the said appellant shall give a good and sufficient bond in the sum of Five Hundred Dollars, and that said appellant shall prosecute said appeal to effect and answer all costs if it fails to make its plea good.

Dated: August 24, 1937.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

[fol. 93] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

To the Chief Judge of the Court of Appeals of the State of New York:

Your Petitioner, Brooklyn and Queens Transit Corporation, appellant in the above-entitled cause, respectfully shows:

This action was brought in the Supreme Court of the State of New York, New York County, to recover the sum of $756,879.50, together with interest thereon, which sum had been paid by your petitioner to the defendant-appellee, The City of New York, involuntarily, under duress and compulsion, and under written protest, as taxes under certain Local Laws of the City of New York, known as Local Laws No. 21 of 1934, as amended, and No. 30 of 1935, which Local Laws were purportedly enacted by the Municipal Assembly of the City of New York under and pursuant to the authority granted, respectively, by Acts of the Legis-

lature of the State of New York known as Chapter 873 of the Laws of 1934 and Chapter 601 of the Laws of 1935, the State Legislature having by said Acts delegated to The City of New York the power during certain specified periods to adopt and amend local laws imposing any tax or [fol. 94] taxes which the State Legislature itself could have imposed for the purpose of raising money for unemployment relief.

The amended complaint herein (hereinafter called the complaint) alleges that the so-called taxes thus sought to be recovered by your petitioner were illegally collected and received by the appellee because the said Local Laws are, and each of them is, unconstitutional, null and void, being in violation of Section 10 of Article 1 of, and of Section 1 of the Fourteenth Amendment to, the Constitution of the United States.

The defendant-appellee, The City of New York, made a motion at Special Term, Part III, of the said Supreme Court, New York County, for an order dismissing the complaint and directing judgment for said defendant on the ground that the complaint did not state facts sufficient to constitute a cause of action, and on the further ground that the said Court had no jurisdiction of the action. Said motion was denied by the Justice of said Supreme Court before whom it was argued upon the grounds set forth by him in his opinion in the companion case of New York Rapid Transit Corporation v. The City of New York, decided simultaneously therewith, in which opinion (the amended complaint in which contained substantially the same allegations as in the above-entitled cause) he held that the Court had jurisdiction of the action and that the allegations of the complaint sufficiently showed that the Local Laws in question deny to your petitioner the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, it appearing from the complaint that a tax measured by a percentage of gross income and imposed upon all "utilities", as defined in said Local Laws, resulted in taking a far larger [fol. 95] proportion of the net income of your petitioner and other street railroad companies for the special purpose of unemployment relief, than of the net income of other utilities included in the taxed class, the petitioner and other street railroad companies being compelled to

do business on a far lower margin of profit than other utilities within the taxed class not because of inferior management but because of essential differences in the character of the respective businesses. Pursuant to said opinion an order was made by said Supreme Court of the State of New York, at Special Term, on January 14, 1937, denying said motion.

From said order the defendant-appellee took an appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. That Court, by order made and entered on May 21, 1937, affirmed said first-mentioned order without opinion, and thereafter, on motion of said defendant-appellee, and by order made and entered on June 1, 1937, the said Appellate Division of the Supreme Court of New York, First Judicial Department, granted said defendant-appellee leave to appeal to the Court of Appeals of the State of New York, and certified to that Court the question: "Does the complaint herein state facts sufficient to constitute a cause of action". Said appeal was argued in said Court of Appeals on the 10th day of June, 1937, and on July 13, 1937, said Court of Appeals by its remittitur of said date ordered and adjudged that the said orders of the Special Term and of the Appellate Division of the Supreme Court of the State of New York be reversed and the complaint dismissed with costs in all courts, and it answered the question certified in the negative. It further ordered by its said remittitur that the record and proceedings in said Court of Appeals be remitted to said Appellate Division of the Supreme Court, there to be proceeded upon according to law.

[fol. 96] Thereafter, on or about the 6th day of August, 1937, the said Appellate Division of the Supreme Court of the State of New York made and entered an order directing that the order and judgment of the Court of Appeals be made its order and judgment, and thereafter, on the 9th day of August, 1937, a final judgment was entered in the office of the Clerk of the Supreme Court, New York County, dismissing the complaint herein upon the ground that it failed to state facts sufficient to constitute a cause of action. Thereafter, on motion of the appellee, said judgment was resettled, to include certain formal omissions therefrom but in no other manner, by order of said

Supreme Court made on August 11, 1937, and entered on August 12, 1937.

The decision of the Court of Appeals of the State of New York was expressly based upon the authority of its decision and opinion in said companion case of New York Rapid Transit Corporation v. The City of New York, decided simultaneously therewith. Said opinion was written by Judge Finch and concurred in by five other Judges, and it shows that said Court of Appeals determined that the complaint in the above-entitled action stated a cause of action for recovery of the taxes in question if the Local Laws in question were unconstitutional but that the said Local Laws were valid as applied to your petitioner, notwithstanding the various grounds, as stated in the complaint, upon which your petitioner contended that they violate the Constitution of the United States.

The Court of Appeals of the State of New York is the highest Court of said State in which a decision in this action can be had.

The question as to whether or not the complaint in this action states a cause of action depends upon whether or [fol. 97] not the aforesaid Local Laws are, as alleged in the complaint, repugnant to the Constitution of the United States, and the said Court of Appeals decided in favor of their validity notwithstanding your petitioner's contention that said Local Laws violate Section 1 of the Fourteenth Amendment to said Constitution.

In accordance, therefore, with Sec. 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the cause is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit, under Sec. 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States under a writ of error, as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set forth in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States as provided by Rules 12 and 46 of said Rules.

Wherefore, your petitioner prays for the allowance of an appeal from the Supreme Court of the State of New York, which has possession of the record of all proceedings herein, and wherein was entered said final judgment dismissing the complaint herein, to the Supreme Court of the United States, in order that the decision of the said Court of Appeals and the final judgment of the Supreme Court of the State of New York (as resettled by said order of August 11, 1937) entered pursuant thereto may be exam-[fol. 98] ined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of New York, under his hand and the seal of said Court may be sent to the Supreme Court of the United States as provided by law, and that an order be made touching the security to be required of the petitioner, and that the bond tendered by the petitioner be approved.

Dated August 24, 1937.

Brooklyn and Queens Transit Corporation, Appellant by Paul D. Miller, George D. Yeomans, Its Attorneys, Office and Post Office Address: 385 Flatbush Avenue Extension, Borough of Brooklyn, City and State of New York.

[fol. 99] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The appellant, above named, assigns the following errors in the record of proceedings in this cause:

The Court of Appeals of the State of New York erred:

1. In holding that Local Law No. 21 of 1934, as amended, and Local Law No. 30 of 1935, of the City of New York, do not deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

2. In refusing to hold, in accordance with the contention made by appellant, that the said Local Laws violate [fol. 100] the equal protection clause of the Fourteenth

Amendment to the Constitution of the United States in that the tax purported to be imposed by said laws upon appellant and other utility corporations is one to raise money, not for the general support of government, but for a special and limited purpose, no more related to those taxed by said laws than to others, and in that no such heavy tax for said purpose is imposed by any law of the City or State of New York upon corporations other than utility corporations, although there is no difference between the latter and other corporations which bears any relation to the stated object for which the tax is imposed and therefore no reasonable basis for a classification whereby utility corporations are taxed far more heavily for said purpose than are corporations engaged in other forms of business.

3. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that they involve palpably hostile discrimination against the appellant and other utility corporations, it appearing from the amended complaint that ordinary business corporations are taxed, for the purpose of raising money for unemployment relief, at the rate of only 1/10 of 1% of their gross receipts from business conducted within the City of New York in excess of $15,000.00, while utilities, as defined in said Local Laws, are taxed thereunder for that purpose at the rate of 3% of their gross income from all sources, without any deduction, so that the latter, including appellant, are taxed on their gross incomes at a rate more than 3000% in excess of that at which ordinary business corporations are taxed for a purpose no more related to the one group than to the other.

[fol. 101] 4. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that there is no reasonable basis for taxing appellant and other street railroad corporations for the purpose of unemployment relief at a rate more than thirty times as high as the rate at which ordinary business corporations are taxed for that purpose, even if there be a reasonable basis for so taxing

utility corporations other than street railroad corporations, it appearing from the amended complaint that appellant and other corporations operating street railroads within the City of New York do not have the protection against competition or other advantages which other utility corporations have and which were cited by the Court of Appeals in New York Steam Corporation vs. City of New York, 268 N. Y. 137, as affording a reasonable basis for the imposition of a tax on utilities not imposed on ordinary business corporations, since appellant and other corporations engaged in the business of operating street railroads in the City of New York do meet with serious competition from the construction and operation of street railroads by the appellee itself without the necessity of obtaining from the Transit Commission a Certificate of Convenience and Necessity therefor and without any supervision or control by either division of the Department of Public Service and since also appellant does not have the chief advantage enjoyed by other utilities of always being assured a fair return on its capital investment, being limited to a fixed rate of fare by contract with the appellee itself from which appellant can obtain no release and of which the appellee had knowledge at the time when said Local Laws, arbitrarily classifying street railroad corporations with other utilities, were adopted.

[fol. 102] 5. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that, as alleged in the amended complaint, the tax therein provided for is measured by a percentage of gross income and applied to a group of corporations, the respective businesses of which are essentially different in character, yielding widely differing ratios of profit, the result being that gross inequalities are produced in the distribution of the tax burden, appellant and all other street railroad corporations being taxed by said Local Laws for the purpose of unemployment relief far more heavily upon their net incomes than other utilities within the taxed class, their operating and maintenance expenses being far higher, and their net income far lower in proportion to gross income, than those of such other utilities, and there being no reasonable

basis for requiring a street railroad corporation to contribute a greater percentage of its net income for relief of unemployment than is required of utilities within the taxed class other than street railroad corporations.

6. In holding that said Local Laws do not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

7. In refusing to hold, in accordance with the contention made by appellant, that said Local Laws deprive appellant of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the money exactions levied upon appellant by said Local Laws are not for the general support of the government and hence are not taxes, but an expropriation of money from one group for the benefit of another, which such expropriation cannot be sustained as part of any plan of regulation since, under the allegations [fol. 103] of the amended complaint, utilities have no special relation to or responsibility for the situation which the proceeds of the exactions are designed to alleviate and do not receive any special benefit from the money expended therefor.

Wherefore, on account of the errors hereinabove assigned, appellant prays that said judgment of the Supreme Court of the State of New York, dated August 9, 1937, as resettled by order of said court made on August 11, 1937, and entered on August 12, 1937, in the above entitled cause, be reversed, and judgment entered in favor of appellant.

Dated: August 24, 1937.

Brooklyn and Queens Transit Corporation, Appellant, by Paul D. Miller, George D. Yeomans, Its Attorneys, Office and Post Office Address: 385 Flatbush Avenue Extension, Borough of Brooklyn, City & State of New York.

[fol. 104] Citation, in usual form, showing service on Paul Windels, omitted in printing.

[fols. 105-109] Bond on Appeal for $500.00, approved, omitted in printing.

[fol. 110] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD

It is hereby stipulated and agreed by and between counsel for the respective parties hereto, that the following are the only necessary papers in this action to be included in the transcript of the record to be certified and filed with the Clerk of the Supreme Court of the United States:

1. The entire record in the Court of Appeals
2. Remittitur of the Court of Appeals, dated July 13, 1937
3. Order of the Appellate Division of the Supreme Court of the State of New York on remittitur, dated August 6, 1937
4. Judgment of the Supreme Court of the State of New York on remittitur, dated August 9, 1937
5. Order of the Supreme Court of the State of New York, dated August 11, 1937, resettling said judgment

[fol. 111] 6. Petition for allowance of appeal.

7. Assignment of errors
8. Order allowing appeal
9. Bond on appeal
10. Statement under Rule 12 of Rules of United States Supreme Court
11. Proof of service of petition for appeal, assignment of errors, statement under Rule 12 and order allowing appeal, together with a statement calling appellee's attention to Par. 3 of Rule 12
12. Citation on appeal, with proof of service
13. This stipulation.

It is further stipulated and agreed that this stipulation supersede and replace the stipulation of the parties hereto as to the transcript of record, dated August 24, 1937 heretofore filed with the Clerk of the Supreme Court of the State of New York in and for the County of New York.

Dated September 13, 1937.

George D. Yeomans, Paul D. Miller, Attorneys for Appellant. Paul Windels, (P.B.), Attorneys for Appellee.

[fol. 112] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 113] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed September 18, 1937

Comes Now the appellant, pursuant to Paragraph 9 of Rule 13 of the Rules of this Court, and adopts its assignment of errors as its statement of points to be relied upon, and represents that the whole of the record, as filed, is necessary for the consideration of said points.

Dated September 14, 1937.

George D. Yeomans, Harold L. Warner, Henry Root Stern, Paul D. Miller, Attorneys for Appellant.

Service of copy of the foregoing is acknowledged this 14th day of September, 1937.

Paul Windels, Attorney for Appellee, Municipal Building, Borough of Manhattan, New York City, N. Y.

A copy of the within paper has this day been received at the office of the corporation counsel, Aug. 26, 1937. Paul Windels, Corporation Counsel.

[fol. 114] [File endorsement omitted.]

Endorsed on cover: File No. 41,917. New York Supreme Court. Term No. 436. Brooklyn and Queens Transit Corporation, appellant, vs. The City of New York. Filed September 18, 1937. Term No. 436, O. T., 1937.